REPLY APPENDIX

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

68 Civ. 394

68 Civ. 864

JOHN KELLY, *et al.*,

Plaintiffs,

—v.—

GEORGE K. WYMAN, *et al.*,

Defendants.

BRIEF OF THE UNITED STATES AMICUS CURIAE

Introduction

This brief is filed by the United States in response to the court's request. It describes certain Federal policies and procedures applicable to the Federal-State program of Aid to Families with Dependent Children (AFDC), Title IV, part A of the Social Security Act, 42 USC 601-609, and those followed in the Federally-administered program of Old-Age, Survivors, and Disability Insurance (OASDI), Title II of the Social Security Act, 42 USC 401 et seq.

No attempt is made to argue or discuss on the merits the constitutional or other issues which are raised by this case. Rather, this brief sets forth certain relevant Federal policies and how they operate, together with an explanation of some of the factors which the Federal agency must take

into account in the development and application of these policies.

In responding to the court's request, we have placed emphasis on furnishing information and clarification. We have not undertaken to discuss in any detail the authority or legal rationale for the various Federal policies. The OASDI program is not involved in this litigation. As for the AFDC program, whether the plaintiff-clients or the defendant-State and local agencies should prevail in this case, it appears, as will be discussed below, that there will be no violation of Federal requirements.

I. *Title IV, part A, of the Social Security Act (AFDC)*

Title IV, part A, of the Social Security Act contains the statutory authorization for the Federally-assisted AFDC program, which is administered by the States and localities. Under this title, as is the case in the other public assistance programs, the Secretary is responsible for determining whether State plans submitted conform to the requirements of the Social Security Act and the Federal policies adopted pursuant to the statute to carry out those requirements.

These implementing policies, which are presently found in the Federally-issued Handbook of Public Assistance Administration (hereinafter cited as HB), reflect the Federal agency's interpretation of the specific provisions, construed in light of the broad purposes, of Title IV, part A, of the Social Security Act. The Federal policies pertaining to State agency procedures such as the prior notice and fair hearing requirements involved in the present litigation, set forth the minimum standards necessary for an approvable State plan. States are free, insofar as their relationship with the Department of Health, Education, and Welfare is concerned, to adopt additional or more elaborate procedures than the Federal basic requirements.

In addition, Federal matching policies are often broader than Federal requirements. Thus, under Handbook Transmittal No. 140, States are not required to continue assistance pending a fair hearing decision, but if a State does continue assistance, Federal matching would be available for all the attendant expenditures by the State agency in accordance with the usual rates described below.

In general, no question would be raised by the Federal administrative agency should a State do more than the minimum Federal requirements, and Federal matching could be claimed for the additional related expenditures. Therefore, because there would likely be no conflict with Federal plan requirements and no loss of Federal funds regardless of what decision this court might reach on the merits of the litigation, we have not deemed it either appropriate or necessary to include legal argument on those issues. For the reasons stated above, it does not appear that the validity of the Federal policies under either the Federal statute or the constitution is in issue here.

The Statute

Section 602 of 42 USC contains three provisions in particular which are relevant to the claims of those plaintiffs in the above-captioned litigation who have been receiving AFDC. In order to be approved by the Secretary, and hence be eligible for Federal matching, the State plan must

> "provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals;" § 602(a)(10),

"provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness;" § 602(a)(4), and

"provide . . . such methods of administration . . . as are found by the Secretary to be necessary for the proper and efficient operation of the plan . . . " 42 USC § 602(a)(5)(A).

The Federal Policy

(a) *Application, Determination of Eligibility and Furnishing Assistance*

Under the policies applicable to a Federally-assisted AFDC program, once the State welfare agency has found an individual (or, as is more common in AFDC, the family unit) eligible for a cash assistance payment, these payments must continue until there has been an agency determination that the individual is no longer eligible for assistance or, although not totally ineligible, should receive a lesser amount of assistance. The agency may not cease or reduce payment while investigating a family's current situation or evaluating information it may have received which appears to raise a question about continuing eligibility. HB, Part IV, § 2200(b)(4). Thus, until the agency has completed any redetermination it may make, has considered all the relevant available information, and has made a definite determination of ineligibility, or change in amount of assistance needed, payments must continue as before.

Effective July 1, 1968, as part of the required procedure, should any question arise concerning change in the family's circumstances, the State agency

"gives advance notice of questions it has about an individual's eligibility so that a recipient has an opportunity to discuss his situation before receiving formal written notice of reduction in payment or termination of assistance." HB, Part IV, § 2300(d)(5).

This procedure is designed to serve several purposes. First, it is intended to give the individual a chance to bring new or additional facts to the agency's attention; thus, he may be able to show, prior to any more formal action, that his situation has not actually changed as believed by the agency. Where this can be accomplished, termination (or reduction) of assistance is avoided, with benefit to both the individual who does not have his usual payments interrupted, and to the agency which will be spared the expense and staff time involved in an unnecessary hearing.

Even in cases which would not be contested by the individual, the advance notice provides him with time to prepare for the change which the reduction or termination of assistance will have on his financial situation. This policy seeks to avoid a situation in which a person is caught completely by surprise with a notice that he will no longer receive any assistance or will receive a lesser amount than formerly.

It should be made clear at this point that the prior notice procedure described above, as required by the Federal policies, is not intended to constitute the "fair hearing" required by the Federal statute, and which will be discussed separately below. The formalities of the fair hearing process are not required at this stage, although a State would certainly be free to add safeguards to this adjustment procedure which go beyond the minimum Federal requirement. This informal process gives notice, and per-

mits an exchange of information before the actual determination is made by the State agency, and as stated above, since this takes place before the agency has made the determination to reduce or terminate assistance, payments must continue without interruption or reduction throughout this time period.

This procedure also operates to "sort out" those cases which will proceed to the fair hearing. Clearly, every recipient has a right to a fair hearing if he is not satisfied with the determination made by the agency in his case; however, it is hoped that this preliminary process will resolve many of the disputes and thus satisfy the recipient. This procedure is also intended to be expeditious. Therefore, the Federal agency expects that the time from which notice is given to the recipient of questions about his eligibility, through agency consideration of any information which is brought to its attention, until the time the agency notifies the individual of its final decision, will not exceed 30 days. The policies on Federal financial participation set an outer limit of 30 days on the time period for which Federal matching may be claimed in assistance payments continued during the notice and adjustment process.

Federal financial participation may be claimed for all the expenditures which the State agency incurs in connection with the prior notice and adjustment procedure described above. The Federal agency will pay 50% of the administrative costs and also participate in the assistance payments made to the individual throughout this 30-day period in accordance with the usual formula (which, for assistance payments under the New York program, is also 50%). (HB, Part IV, § 5514(2)(c) (as revised)).

The procedure which New York has adopted in response to the Handbook policy on prior notice and which is in issue

in the present litigation satisfies the basic objectives of that Federal requirement. While New York has allowed for variations in procedures under its two options, they both meet the purposes for which this requirement was designed, namely the giving of advance notice to the recipient before action is taken by the agency, and the availability of a mechanism whereby information may be presented, and adjustment is possible.

Plaintiffs, in their Brief in Opposition to Defendants' Motion for Summary Judgment, question whether the New York procedure meets the Federal requirement that the State plan "be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them." 42 USC 602(a)(1). While it is certainly true that this provision means that there must be a uniform program in effect throughout the State, the Department of Health, Education, and Welfare does not interpret this section of the statute to require absolutely identical procedures in every political subdivision. Rather, this subsection is satisfied if the procedures everywhere in the State meet the fundamental purposes to which the Federal policy is directed. In some instances, the Department of Health, Education, and Welfare may determine that there is only one possible procedure, or that certain components are essential (or, even, unacceptable), in order to carry out its purposes. However, in the present case, both options which the New York State agency allows provide prior notice and an adjustment procedure, and thus, the possible differences in other details do not raise a question of the uniformity of the program.

The Department of Health, Education, and Welfare has approved the New York regulation, but is nevertheless seeking clarification on one point. The Federal policy on prior notice and adjustment is mandatory with respect to both

contemplated terminations and reductions of assistance. The New York regulation only expressly refers to the former situation. Therefore, it is necessary to seek confirmation from the New York agency to assure that its procedures on prior notice and adjustment are equally applicable to proposed reductions in the assistance payment.

(b) *The Fair Hearing*

As stated above, the Federal statute requires the State agency to provide an opportunity for a fair hearing to anyone whose claim for assistance is denied, or is not acted upon with reasonable promptness. This has been interpreted by the Department of Health, Education, and Welfare to require the same fair hearing in connection with termination of assistance or reduction in the amount of assistance and, indeed, such a hearing may also be required in connection with various other decisions which the agency makes affecting the AFDC family. See, generally, HB, Part IV, § 6200 et seq.

The Federal policies contemplate, in any termination or reduction of assistance, that the welfare agency will give formal written notification of the action to the client (after use of the prior notice and adjustment procedure discussed above). At this point, the client has a right to a fair hearing. In New York, as in other jurisdictions where there is local administration, the distinction between these two procedures is clearcut. The locality (New York City) gives the recipient advance notice and an opportunity to provide additional information. After considering the information, if any, that may be presented, the locality makes its formal determination and informs the recipient in writing. The recipient may then request a fair hearing before the State agency.

Under the current policies in the Handbook, continuation of assistance pending the fair hearing decision is not required.[1] However, should the State welfare agency choose to continue such payments, with no recovery or adjustment should the hearing decision be in favor of the agency, or should this court rule that continuation is required, such a practice would be completely consistent with Federal rules, and Federal financial participation may be claimed for the assistance payments made during this period. HB, Part IV, § 6500(b). Matching will be available in accordance with the usual 50% rate (for New York) for assistance payments.

In February, 1968, the Department of Health, Education, and Welfare notified all States that, effective July 1, 1968, payments of assistance retroactive to the date of the incorrect agency action must be made in those cases where the decision of the State agency following the fair hearing is favorable to the claimant (HB, Part IV, § 6200 (k)), and Federal financial participation may be claimed for such retroactive assistance payments. HB, Part IV, § 6500 (a). This requirement applies to hearing decisions after June 30, 1968 and means that retroactive payments must be made back to the date of the incorrect agency action or July 1, 1968, whichever is later. If the incorrect action was earlier than July 1, 1968 and the State chooses to make retroactive payments for the full period, Federal financial participation is available for the payments back to the date of the incorrect action.

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[1] The Department of Health, Education and Welfare has decided to adopt a policy requiring states to continue assistance in certain classes of cases until a decision is rendered in the fair hearing proceeding. Although no formal statement of this contemplated policy has been issued, distinction between classes of cases along the lines suggested at pages 8-10 of Judge Bryan's Memorandum convening a three-judge court in this matter is being considered.

In addition, the States were notified at the same time of several other new policies, some pertaining to the increased availability of Federal matching and others setting forth new plan requirements in the area of fair hearings. The new Federal requirements became effective July 1, 1968 and New York submitted implementing plan material. However, the State was notified that its plan amendment was not acceptable in several areas. In particular, the plan amendment was deficient with respect to its provision for (1) detailing of the circumstances under which an individual could obtain a fair hearing, (2) informing the local agencies of fair hearing decisions and assuring that such decisions will be treated as precedents by the State and local agencies and will be made available to claimants and their representatives and the general public for their precedential value, (3) providing an impartial medical assissment at agency expense when medical issues are involved in the hearing, (4) making retroactive payments where the fair hearing decision of the State agency is favorable to the claimant, and (5) specifically providing that the hearing officer's decision must be based only upon evidence which is a part of the record.

Because of the pendency of these questions, no action on the plan amendment has been taken by the Federal administrative agency. It is their understanding that New York is in the process of preparing revised material to fully comply with the Federal requirements and will then submit the revision for formal Federal approval. While the New York plan, as currently approved, does not at this moment fully meet the Federal requirements regarding fair hearings, no question of continuation of Federal funds has been raised, in view of the continuing negotiations between the Federal and State agencies. Federal funds of course, are

not withdrawn unless there has been formal disapproval of a State plan and the State has been given notice and opportunity for hearing.

As this court is aware, the question of whether a State welfare agency is required under the due process clause of the Fourteenth Amendment or any other generally applicable principle of law, to continue assistance pending the fair hearing decision, is one which is currently the subject of litigation in various other jurisdictions.[2]

II. *Title II of the Social Security Act (OASDI)*

Termination and Suspension of OASDI Benefits

1. The entitlement of an individual to an OASDI benefit depends on meeting stated statutory conditions. Once established, the individual's entitlement to the benefit continues until the occurrence of specified termination events. Upon the occurrence of such an event, the benefits are terminated as of the close of the month preceding the month in which the event occurred. In disability benefit cases, however, the benefits are terminated as of the close of the second month following the month in which the disability ceased; or, in cases in which benefits are terminated because the individual returned to work, the termination is effective as of the close of his "trial work period" which can be as late as the eleventh month following the month he returns to work.

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[2] In addition to the cases cited on page 10 of Judge Bryan's memorandum opinion in this matter, we understand that these suits have been filed in Federal district courts: *Machado* v. *Hackney*, C.A. No. 68-108-SA (W.D. Tex.); *Sprayberry* v. *Dulaney*, C.A. No. (M.D. Ga.); *Van Blaricum* v. *Department of Public Welfare*, C.A. No. 68-78 (S.D. Ohio).

2. Between the date as of which entitlement to the benefits is established and the occurrence of an event calling for the termination of the benefit, other statutorily prescribed events may occur that require the suspension or nonpayment of the benefit (as distinguished from terminating entitlement to the benefit) for one or more months. These events are principally:

a. Earnings by a beneficiary over and above an amount prescribed by the statute;

b. Work outside the United States by a beneficiary for a period of time specified by the law;

c. Residence by an alien beneficiary outside the United States;

d. Court-ordered suspension upon conviction for subversive activities;

e. Refusal of vocational rehabilitation services by a disability insurance beneficiary;

f. No entitled child in a mother's care;

g. Deportation of the beneficiary;

h. Receipt by a disability insurance beneficiary of periodic workmen's compensation payments; and

i. The performance of substantial gainful activity by an occupationally blind disability insurance beneficiary.

3. The determination of the Social Security Administration to terminate a benefit because of the occurrence of a specified terminating event or to suspend the payment of a benefit for one or more months because of the occurrence of a suspension event, is based in the vast majority of cases on a report of the occurrence of the event by the bene-

ficiary. The determination to terminate a benefit or to suspend its payment for one or more months may be made also on information obtained by the Administration from other sources. Before this is done, however, the beneficiary is usually contacted by the Social Security Administration and asked to submit a report relative thereto which often furnishes also necessary data on which to base a termination or suspension and on which the termination or suspension determination is then made. The greatest number of these suspensions by far are based on reports of current wages from employment or of self-employment income derived by beneficiaries in amounts in excess of those they may earn or derive under the statute and still receive their benefits.

In every case in which a benefit is terminated or suspended, whether the action is taken pursuant to the report from the beneficiary or on information obtained from other sources, the individual affected is notified in writing of the determination and is advised of his rights to further administrative and court review of the determination.

Under the regulations of the Social Security Administration adopted pursuant to section 205(b) of the Social Security Act, the determination of the Administration to terminate or suspend a benefit is a "final decision" if the beneficiary fails to seek its reconsideration by the Administration, 20 CFR 404.908, and each successive administrative decision likewise is, in turn, a "final decision" unless further administrative review is sought, as provided by the regulations, 20 CFR 404.916, 404.940, 404.951, or if after all such administrative review has been had, the beneficiary does not seek court review as provided by section 205(g) of the Act.

Benefits are not certified by the Administration for payment to a beneficiary from and after the effective date of

the initial determination terminating or suspending payment of a benefit unless it is reversed on further administrative review or by a court on court review. Upon reversal, the benefit is certified for payment retroactively to the date as of which it was terminated or suspended.

4. The certification of benefits for payment may be withheld also while the Administration, on the basis of information it has received, is conducting an investigation to determine whether or not it should terminate the benefit or suspend its payment for one or more months. This, as the Social Security Administration Claims Manual states, may be done, however, "only where it appears probable that payments will eventually have to be suspended or terminated," and may continue, it is further stated in the Manual, merely "as long as necessary to offset the probable overpayment." Claims Manual section 5036, paragraph 1. Social Security district offices and reviewing offices are enjoined, too, to give high priority to such investigations, to complete them promptly and to determine as quickly as possible whether or not benefits should be terminated or suspended. Claims Manual section 5036, paragraph 2.

There are some instances also in which payment may be withheld for administrative reasons not related to the right to payment but to what might be termed the "technique of payment." This occurs where the Administration is notified by the Post Office Department or by others that the beneficiary has moved and left no forwarding address or where the appointment of a representative payee may be required. In these instances all past due benefits are, of course, certified for payments as soon as new proper address is obtained or a payee is appointed.

5. Section 203(h) of the Social Security Act expressly authorizes the Administration to withhold certifications of

payment pending investigation as to whether work deductions should be imposed. Sections 205(b) and (i) of the Act appear to authorize the Administration to withhold certifications of payment pending determination of whether or not to terminate or suspend certification for payment in other than work deduction instances.

Payments may be withheld pending development of the facts essential to a determination as is recognized by section 205(g) of the Act, authorizing the Administration, under stated conditions, to adopt "expedited benefit payment" procedures; by section 204 of the Act, specifying to whom unpaid benefits due a deceased beneficiary shall be paid; and by section 206 of the Act which provides for setting of attorneys' fees in Title II cases.[8]

III. *AFDC and OASDI Compared*

For purposes of drawing an analogy between the procedures followed by the Social Security Administration in operating its program of OASDI, and the Federal requirements pertaining to AFDC programs, it may be helpful to note some differences in the overall situations:

1. The kinds of situations or events which might give rise to termination or reduction of benefits are far fewer in OASDI than in public assistance, particularly AFDC. Also, most of the events affecting payment of OASDI tend to be more readily susceptible to objective ascertainment and hence less open to dispute than is often the case in the public assistance programs.

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[8] *Hopkins* v. *Cohen*, 390 U.S. 530 (1968) held that accrued benefits due a beneficiary and his family, to which they became entitled as the result of judicial review, provide the base for determining the attorney's fee.

2. In OASDI, the events which result in suspension or termination are often changes in circumstances which the beneficiary himself reports to the Social Security Administration; thus, the resultant action is generally expected and understood by the individual.

3. There is a much greater likelihood of change in the amount of a recipient's payment under AFDC, than there is in OASDI, or even in the other public assistance categories of the Social Security Act (Titles I, X, XIV, and XVI). If the recipient obtains temporary employment for a month, he will be eligible only for a reduced payment, or perhaps no payment at all; when the income ceases, the family will probably be eligible for the full amount previously paid. Support payments may be made by an absent father for a few months and then cease. The problem, therefore, of the proper procedures to be followed in AFDC is more difficult for both the recipient and for the State agency, than is the comparable situation in OASDI.

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